But the real pressure at the bottom level, at the places where the cases are being generated and at the places where the plans are being drawn, is to draw nice, neat, pretty districts that comply with whatever the Supreme Court might think of as traditional districting principles. Although there never have been traditional districting principles, allegiance to the Court's vision of these principles will at least to some extent protect districts from challenge.

And I suspect that has some possible implications. I suspect that it means that it may be harder to draw districts with as high a percentage of minority voters, so jurisdictions will opt for districts that may be closer to fifty-fifty districts or fifty-five-forty-five districts, although certainly that didn't save the district in *Shaw* from challenge.

I think those are some of the implications we can look for as the courts and lawyers on both sides struggle with how to comply with a standard where the Court gave almost no guidance on what that standard is, or how to draw districts that avoid litigation.

PROFESSOR KOUSSER: Well, I should say first that I did testify or at least wrote reports in both North Carolina and Texas.

I want to go back to the original *Shaw v. Reno* opinion to try to put these succeeding cases in context. One of the things that strikes you most if you look at *Shaw v. Reno* is how few facts they had. It was a case that had been dismissed, and the question was whether there was a cause of action at all. And there are almost no facts in it, and most of the ones that are there are wrong.

For example, the only mention of the degree of "segregation" in the districts is in a footnote in Justice White's dissent in which he says the 12th District is 54.71% black. And they didn't have any evidence at all about the historical nature of redistricting in North Carolina.

In the plaintiff's brief before the Supreme Court in *Shaw v. Reno*, it says, "There has never been a racial gerrymander in North Carolina before. Just look at the shapes of the districts."

Now, he knew that that was incorrect. In fact, in 1981 there was a six-month deadlock in the state legislature because they wanted to draw a district to protect a very conservative white incumbent, and they wanted to draw it to exclude Durham, which is where all these people who were plaintiffs in *Shaw v. Reno* came from. They wanted to exclude Durham because they didn't want to draw a district that a black had a fair chance to get elected in.

That was overturned by the Justice Department, a section 5 objection. That was surely on record. But the Supreme Court didn't take any of this into account.

It seems to me that *Shaw v. Reno* ought to be seen as an intent case, and it ought to be seen as an intent case that goes back on remand to the lower courts, and it says, "All right, on the face of it, it would look like this district was drawn only because of race. But we want more evidence on this. Is this the only thing?"

And Justice O'Connor again and again in her opinion says this is the only reason why the districts were drawn.

Kay Butler, in her previous remarks, uses the same terms. And yet we all know that that is not true. We know that this district, if you look at it, the 12th District in North Carolina or the districts in Dallas or Houston, were drawn in the particular shape they were in and would have the particular compactness score that they have because of a whole variety of reasons.

Lots of things go into districting: incumbent protection, partisanship, where a certain legislative assistant lives, where a Congressman lives. All sorts of things go into districting, and that is what results in the shapes of districts.

So it seems to me that what we ought to do in seeing the remand cases is to say that the Supreme Court is asking for more evidence on these sorts of questions: What is the nature of the districting process? Is there any historical discrimination in the process of redistricting itself—a specific thing, not general societal redistricting—to be alleviated here? And then we should ask whether the lower courts have done a very good job in answering what seems to me to be the focus of the questions by the Supreme Court. And I think the answer to that is "no." And unfortunately, I think that is true in Judge Phillips's opinion as well as the bizarre opinion in *Hays v. Louisiana* and the less bizarre but still strange opinion in *Vera v. Richards*, the Texas case.

I think that the best way to get at those sorts of questions is to look at a huge array of specific evidence. That evidence was presented in *Shaw v. Reno*; it was presented in great detail in *Vera v. Richards*. But the district court judges basically ignored it—in *Vera v. Richards* in particular.

And I think one of the things that is likely to happen in the Supreme Court is that either that evidence is going to be presented or they are going to assume that it isn't in existence or they're going to ask for more evidence, as far as you could interpret the *Hays*

vacating of the opinion as asking for more evidence or looking at further empirical evidence.

So it seems to me that there are a whole series of empirical questions which are raised by *Shaw v. Reno*, which are not settled, and which the district court cases ought to settle.

MODERATOR: How can they settle them? If they take the broad-minded reading that you suggest, it would be clear that all of these districts would pass the strict scrutiny hurdle. So, for *Shaw v. Reno* to have any of its guts left, you would have to read Justice O'Connor as saying that as long as race is a substantial factor at all, the districts have to fall. Isn't that right?

PROFESSOR KOUSSER: I am not sure. That's not what she says. She says "sole factor." One of the questions when it goes up again is did she mean that? If she says it means substantial factor, then the Supreme Court or a set of district courts is going to have to lay out some principles by which we can decide whether there was a racial intent in the gerrymandering. How substantial does substantial have to be? That question certainly has not been addressed so far.

And it certainly can't be addressed within the mechanical compactness standard. It's going to have to be addressed in a much more fact-laden, empirical framework. And district courts ought to be very good at that, at dealing with the huge amount of evidence. But they haven't been, so far.

MODERATOR: Anita Hodgkiss, let me come to you. You have been a lawyer in the *Shaw v. Reno* case on remand. Why did the district court there say that there was a sufficient compelling interest, and in what ways was the solution of creating the two minority districts narrowly tailored to accomplish that purpose?

MS. HODGKISS: I actually think that Judge Phillips did a good job on both those questions. He said that there were three compelling state interests.

The first was compliance with section 2 of the Voting Rights Act, and he said that earlier plans that had been presented to the North Carolina legislature as well as the very plan that the Republican intervenor plaintiffs in the litigation presented to the Court both showed that it was possible to draw two compact majority-black districts in North Carolina, thereby meeting the *Gingles* threshold requirement.

And once you do that, the state legislature then has the discretion to draw the districts in whatever portion of the state they want to and to have whatever shape they want to, in line with all the other considerations that the legislature needs to take into account.

important—and there is a whole political science literature on this—then indeed these districts did conform.

We showed that the North Carolina plan was more distinctive than any previous plan, that the districts as a whole better represented, independent of race, the diversity of districts in the State. In other words, we compiled a whole series of empirical demonstrations showing that indeed there was no impact on innocent third parties and that, in fact, these so-called dysfunctional districts functioned better than more traditionally compact districts.

Now, would that hold elsewhere? Would you find those same characteristics? The answer is we don't know. There certainly, for example, in Texas, was not evidence that the districts in the urban areas shared the same kind of socioeconomic homogeneity of the districts in North Carolina, and that argument was not made in the State of Texas.

So by no means are these things determined. And once we get away from this narrow fixation with compactness and look at the real issues of whether districts function or not, I think there are reasonable standards for judging these districts.

MODERATOR: Let's go back to two words in Justice O'Connor's opinion in *Shaw v. Reno*: "political apartheid." To what extent is there a symbolic injury in being forced to live in a district or a state where certain voters have obviously been "corralled," in the language of some of the lower courts, into particular areas because of their race? Is this something that is being litigated? Is this something where evidence is being taken at the lower courts about whether there is such a symbolic or even emotional injury?

PROFESSOR KOUSSER: I should point out that the first racial gerrymandering congressional districts in North Carolina came in 1871-72. There was a district called the Black 2nd. It is the only district in the South during the 19th century that has a biography written about it.

The State was approximately one-third black, and it was the only majority-black congressional district drawn in the state, and it was drawn in a very self-conscious manner. So if there is a symbolic injury from racial gerrymanders, it is a symbolic injury that black people have had to be putting up with since very shortly after the promulgation of the Fifteenth Amendment, and it is strange that the Supreme Court should decide it now and that it is something that only white people get a chance to talk about.

There was an inevitable conflict between two conceptions of the Reconstruction Amendments, I think. When Justice O'Connor

discusses the 14th Amendment in *Shaw v. Reno*, she uses the phrase "discrimination *between*." Generally, when we have thought of the Fourteenth Amendment and other amendments in the Reconstruction Amendments previously, we have thought of "discrimination *against*." And in some sense, most of the time in American history since Reconstruction has been a story of racial discrimination in which there hasn't been any distinction between discrimination between and discrimination against.

Discrimination between black people and white people or black people and Latinos, black people and Asians, white people and Asians, anybody like that, has always been *against* the people of color as well as *between*.

Here, she seems to finesse the issue of injury by talking about discrimination between. And it seems to me that one way that we can think about the conflict between *Shaw v. Reno*, at least in its initial guise, in these opinions in their initial guise, and the trend of minority vote dilution cases, is to distinguish between discrimination between and discrimination against.

And it seems to me what the Supreme Court fundamentally has to face in any consideration, further consideration of such issues, is when you come to the question of when discrimination between and discrimination against are not entirely compatible, then what do you do?

In the *Croson* line of cases, and other sorts of things, you have discrimination at least allegedly against, and not purely discrimination between. There is allegedly injury there which is relatively concrete. The company, in *Croson*, lost a contract to produce urinals for the City of Richmond, and they were angry at this. And so there was some injury.

In *Shaw*, the injury is not at all clear. One more fact indicates from the depositions that the injury is not clear, and that is, Ruth Shaw, the named plaintiff, voted for Mel Watt, she says, in the 1992 election. If she was not represented, why did she vote for him?

MS. HAIR: I think this question of political apartheid is very important, and I think it's important to go back and look at what Justice O'Connor said about what the indicia are of this condition of political apartheid or racial gerrymander.

When she tried to identify injuries, the types of injuries that she identified were that the districts were likely to lead to the election of congressional representatives who owed their election to only one race and therefore were answerable only to constituents of one race.

the facts that our witnesses presented, and these were the arguments that our lawyers made."

You know, it seems to me that at least the audience ought to recognize that this is a partisan panel and that this is a partisan presentation by a partisan witness and indeed somebody else may look at those facts—I am not sufficiently familiar with the North Carolina case to comment—but I believe before Professor Kousser makes his remarks, that it's important that you understand that perspective.

MODERATOR: Okay. Professor Butler, thank you for that intervention.

I would like to say that we have made an effort to have several points of view represented here. There is no monolithic ideology represented on this panel, and I think anyone who has participated in these discussions has seen that there is a diversity of views about the value of these districts, about alternatives to these districts, and your presence here demonstrates a commitment to finding other voices. But if you are unhappy with that, we'll just have to do better next time.

Professor Kousser, please proceed.

PROFESSOR KOUSSER: I would be happy to have anybody else look at this same information, and you can come to whatever conclusions you want. Figure 1 and figure 2 are drawn from the Congressional Quarterly Conservative Coalition scores, which are readily available in the Congressional Quarterly annual index to anybody.

I have divided Congresspeople in North Carolina into three groups. If you look at the Conservative Coalition scores, I divided the Members of Congress into three groups. One is Republicans. I looked at the Conservative Coalition indexes for 1973 to 1993. Republicans are the ones up at the top. They are always around ninety percent or ninety percent-plus Conservative Coalition scores.

If you look at the Democrats from the two districts that have the largest proportion black, the 1st and 2nd Districts up through 1991, those are white Democrats. Those are the squares. And those people are about sixty to seventy percent, they started up even higher on the Conservative Coalition index. Up through 1980, they looked just like Republicans, despite the fact that these are what would be expected to be minority-influenced districts.

PROFESSOR PARKER: These are the ones that are supposed to be most responsive to minority interests.

PROFESSOR KOUSSER: That's correct.

Fig. 1: Do White and Black Congressmen Differ in North Carolina?

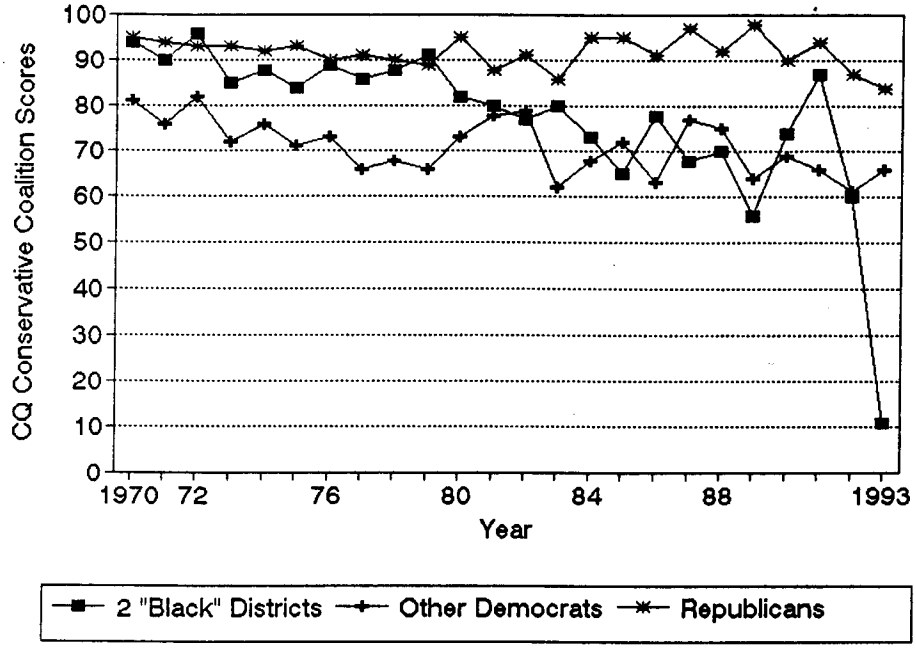
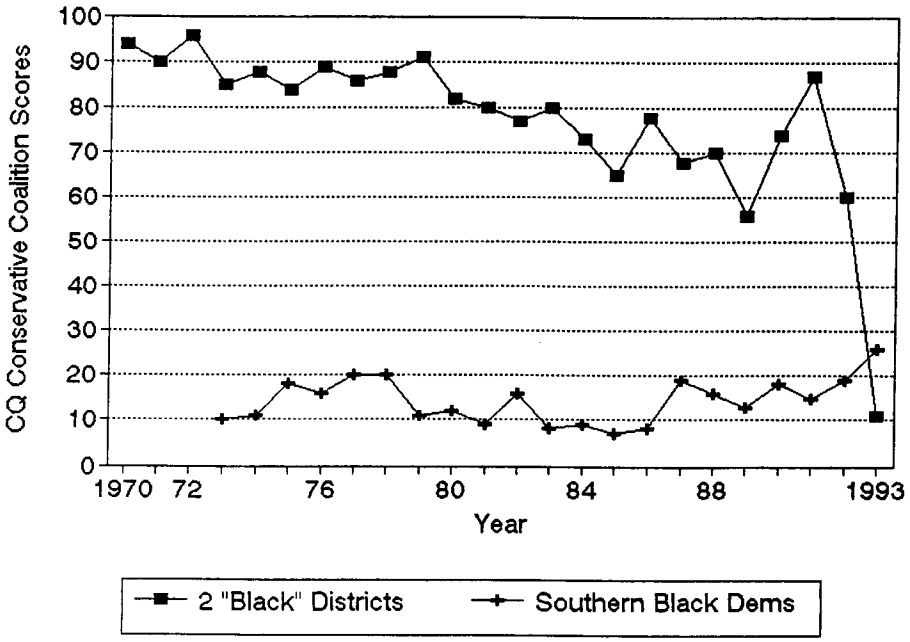


Fig.2: N.C. "Black Districts" vs. Other Southern Black Members of Congress



PROFESSOR PARKER: Because they are from districts that are thirty to forty percent black?

PROFESSOR KOUSSER: That's correct.

The other Democrats from districts with smaller proportions of minorities are the little crosses. They start at around eighty percent conservative; they go down to perhaps seventy percent. They are indistinguishable, basically. After 1980, they are basically indistinguishable from the other districts.

Obviously, the thing that should catch your eye is what happens in 1993. For the first time since 1898 you elect Members of Congress who are black from North Carolina and their Conservative Coalition scores average about ten.

Blacks had been excluded, in the views that black voters had before 1993, they had been excluded from representation in Congress. Finally, they get included.

Now, you could choose another index. If you chose any of the rest of the normal indexes that are used, the ADA index, the American Conservative Action, the Chamber of Commerce index, you would find roughly the same thing. The correlations between the Conservative Coalition scores and the others show that they are roughly the same.

Was this something that just happened because of a time effect that was because you've got a Clinton Administration and you suddenly got people who would vote very liberally? Well, if you look at the rest of the black Members of Congress from the South in figure 2, they are on the lower part of the scale. They are approximately ten to twenty percent conservative. Mel Watt and Eva Clayton come right in that area.

So, it appears that they were not different from what would have happened before if there had been majority-black districts, if blacks would have gotten their policy views represented. Until you get black-majority districts, in North Carolina at least, it certainly doesn't happen.

So, if you ask the third empirical question that Justice O'Connor asks, which is, "Do you get people who are responsive to only one constituency, once you get black-majority districts or minority-opportunity districts drawn," the answer to the question is probably "no," in general.

But if you flip the question over and you say, "Unless you have black-majority or majority-opportunity districts—minority opportunity districts, do you get representatives who are white, but who are favorable to the minorities," then the answer for North Carolina is

"no." You don't get people who are favorable to minority interests until you get minority-opportunity districts drawn. There is exclusion. There is segregation of white congressional opinion. Blacks are segregated out, their influence is segregated out until you get minority-opportunity districts drawn.

So it is an empirical question. Anybody can draw these sorts of things. Anybody can critique these sorts of things. In this sense, this is an extremely objective way to look at it. It is not simply a partisan thing on the part of the voting rights lobby or anyone else. But this is the fact of the matter. Blacks were excluded.

MS. KING: I think it would be a very interesting concept, Dr. Kousser, and it's a very realistic concept. In the *Johnson v. Miller* case, although I thought it was a very ridiculous theory, one of the harms that was set forth by the moving party was that this was the precise harm that they were alleging, that issues were being raised on the congressional floor that were contrary to the interests of Republicans and conservatives, such as the crime bill's Racial Justice Act, and the fact that you were allowing minorities to be represented disallowed the representation of the majority people in a particular district because these issues were being raised on the floor and these issues were being voted upon by minority Members of Congress.

I think that is the danger of *Shaw v. Reno*, and it goes far beyond partisan politics, and it really gets down to issues that are being raised and issues which certain individuals do not want to be discussed in these political debates.

PROFESSOR PARKER: The data from Mississippi also support Professor Kousser's conclusions. I was not involved—well, let me say, first of all, I had nothing to do with the North Carolina case, I wasn't a lawyer in the North Carolina case, I wasn't a witness in the North Carolina case, so I can be an unbiased, impartial panelist here.

The same thing is true. Webb Franklin was elected in a Mississippi congressional district, the 2nd Congressional District, which was forty-eight percent black in voting age population in 1992 and 1994. He voted as high on the Conservative Coalition scale, voted against black interests.

And also, Mike Parker, who represents a congressional district, a white Representative in the congressional district in Mississippi that is over thirty percent black, voted against the Civil Rights Act of 1991.

MODERATOR: So is the contrary hypothesis then that the presence of a substantial minority but a distinct minority—say, twenty to thirty percent of blacks in an overwhelmingly white district—encourages at least racially coded politics by conservative